HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

WPMS No. 1173 of 2003
Dukhatar Jahan

Vs.
Additional District Judge II F.T.C.

Approved for reporting.

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~~Not approved~~ for reporting

Date of decision 18.05.2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 1173 (MS) OF 2003

1. Dukhtar Jahan, W/o Mohd. Hassan,
   R/o Ward No. 6, Kichha, Tehsil-Khatima,
   District-Udham Singh Nagar.
2. Kamal Ahmad, S/o Munna Phalwala,
   R/o Ward No. 6, Kichha, Tehsil – Khatima
   District-Udham Singh Nagar. .....Petitioners.

Versus

1. Addl. District Judge, II, F.T.C., District-Udham Singh Nagar.
2. Khalik Ahmad, S/o Habib Ahmad,
   R/o Ward No. 6, Kichha, Tehsil – Khatima,
   District-Udham Singh Nagar.

.....Respondents.

dated: 18.05.2006

Hon'ble Rajesh Tandon, J.

Heard Sri B.S. Khanka, Advocate for the petitioners, Standing counsel for the respondent no.1 and Sri M.C. Pandey, Advocate for the respondent no.2.

By the present writ petition, the petitioners have prayed for a writ of certiorari quashing the order dated 16th October, 2003 passed by the respondent no.1.

Briefly stated, a suit No. 14 of 2003 was filed praying for a decree for permanent injunction restraining the respondents from interfering in the premises in dispute. Along with the suit, respondent no. 2 has also filed an application under Order 39 Rule 1 C.P.C. The suit was instituted on 16th May,

2003 and it appears that the written statement was filed on 06.09.2003.

The impugned order has been passed directing the petitioner to take back the written statement 28-Ka and the same shall not be taken on the record of the case.

A perusal of the order passed by the addl. District Judge shows that not only the written s tatement was directed to be taken back also further order has been passed that the sut will proceed ex parte.

During the proceedings of the case, the plaintiff has filed an application 30-Ga stating therein that the written statement filed by the petitioner is not admissible as the same was filed on 6th September, 2003 when in point of fact, the service was already affected on 17.05.2003 and the petitioner has put no appearance on 27.05.2003, through the Advocate.

The petitioner has controverted the said application and has submitted that they are entitled for the extension of the time under Section 151 of the Code of Civil Procedure as she is an illiterate lady.

Sri M.C. Pandey, appearing for the respondent no. 2 has referred the provisions of Order 8 Rule 1 as substituted w.e.f. 1ST July, 2002. The same is quoted below:-

"[1. Written statement.- The defendant shall, within thirty days form the date of service of summons on him, present a written statement of his defence;

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such order day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.]"

The impugned order was passed on 19th October, 2003 and thereafter various judgments of the Apex Court were pronounced, where Order 8 Rule 1 has been held to be procedure law and is directory. The Apex Court in ***Kailash Vs. Nanhku and others 2005 AIR SCW 2346*** has held as under:-

> *"27. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the po4rcess of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by "Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar)1975) 1 SCC 774, are pertinent:-*
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> *"The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.*
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> *The processual law so dominates in certain systems as to overpower substantiove rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiate where the tragic sequal otherwise would be wholly inequitable. Justice is the goal of jurisprudence-processual, as such as substantive."*

3. As stated earlier, Order VIII, Rule 1 is a provision contained in CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order VIII, Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the Court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

45. We sum up and briefly state our conclusions as under:-

(i) The trial of an election petition commences form the date of receipt of the election petition by the Court and continues till the date of its decision. The filing of leadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition affording opportunity to the defendant to file written statement. The availability of such power in the High Court is spelled out by the provisions of the Representation of the People Act, 1951 itself and Rules made for purposes of that Act and a resort to the provisions to the CPC is not called for.

(ii) On the language of Section 87(1) of the Act it is clear that the applicability of the procedure provided for the trail of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure

contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose and embargo on the power of the Court to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify and penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of Procedural La and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure thereform would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an

exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was need to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

As will appear from the aforesaid observations of the Apex Court, order 8 Rule 1 of the Code of Civil Procedure has been held to be procedural law. Although it prescribes a time limit within which the written statement has to be presented, but at the same time it does not provide any penal consequences if the time limit is not observed.

Thus the court below while refusing to entertain the written statement and even directing for the return of the same and further struck off the defence of the petitioner will amount to penal consequences, which in the opinion of the Apex Court, cannot be permitted by penalizing the defendant not to participate during the trial of the suit.

Counsel for the petitioner has also referred the judgment of ***Shaikh Salim Haji Abdul Khayumsab Vs. Kumar & others 2006 (1) SCC 46,*** where the Apex Court after relying upon the judgment of ***Kailash Vs. Nanhku (2005) 4 SCC 480*** as well as the judgment in ***Sangram Singh Vs. Election Tribunal, Kotah, (1955) 2 SCR 1,*** has observed that procedure must be recorded as something designed to facilitate justice and not a penal enactment for punishment. Relevant observations are quoted below:-

"14. Procerual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

15. It is also to be noted that though the power of the court under the proviso appended to Rule 1 of Order 8 is circumscribed by the words "shall not be later than ninety days." But the consequences flowing from non-extension of time are not specifically provided for though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

18. The matter can be looked at from another angle. Undisputedly the trial court had granted time up to 19-2-2004 which undisputedly fell beyond the 90 days' period. Since 19-2-2004 happened to be a holiday, the written statement was filed on the next day. Had the written statement been filed on 19-2-2004, obviously the court could not have refused to accept the written statement as it was within the time granted by it. Merely because of a fortuitous circumstances the written statement came to be filed on the next day i.e. on account of the date fixed being a holiday that cannot make the written statement filed, unacceptable."

In ***Sangram Singh V. Election Tribunal, Kotah,)1955) 2 SCR 1,*** considering the provisions of the Code of Civil Procedure dealing with the trial of suit, it has been observed as under:

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it.

Now, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which means requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed wherever that is reasonably possible, in the light of the principle."

Admittedly, the court below has taken on the record the written statement and at the same time, the order has been passed directing the written statement to be taken back, will certainly be imposing a penalty on the petitioners and further his defence having been struck off, is also very serious in nature and therefore, the order passed by the Addl. District Judge is liable to be quashed.

The written statement, which has already been filed shall be taken on the record with full opportunity to the petitioner to defence themselves.

Consequently, a writ of certiorari is issued quashing the order dated 16.10.2003 passed by the respondent no.1. The suit is pending since 2003, is directed to be expedited and shall be decided within a period of six months from the date of production of the certified copy of this order.

Writ petition is allowed. No order as to costs.

(Rajesh Tandon, J.)

18.05.2006
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Note:- Office is directed to send the copies to all the District Judges of Uttaranchal regarding the scope of order VIII rule 1 of the Code of Civil Procedure.